

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

THE KRYSTAL COMPANY,

Debtor.

Chapter 11

Case No. 20-61065-PWB
Jointly Administered

OBJECTION TO PROPOSED CURE AMOUNT

COMES NOW, 522 Highway, LLC ("Landlord") and files this "Objection to Proposed Cure Amount" (the "Objection"). In support of the Objection, Landlord shows the Court as follows:

INTRODUCTION

The Krystal Company ("Debtor") filed its "Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases" (the "Cure Notice") (Doc. No. 310) on April 7, 2020. Landlord and Debtor are parties to an unexpired lease dated January 25, 2017 (the "Lease") for real property located at 522 Highway 19 South, Meridian, Mississippi 39301 (the "Premises").

Debtor has defaulted on the terms of the Lease. To assume the Lease, Debtor must cure the default, compensate Landlord for any actual pecuniary loss resulting from Debtor's default, and provide adequate assurance of future performance under the Lease. 11 U.S.C. § 365(b)(1).

In the Cure Notice, Debtor proposes \$33,040.32 to cure all defaults under the Lease (the "Proposed Cure"). As set forth below, Landlord shows that the Proposed Cure is insufficient to cure Debtor's defaults under the Lease and asserts that Landlord is entitled to a cure, as of April 30, 2020, in the amount of **\$42,262.84** pursuant to 11 U.S.C. § 365(b)(1) (the "Total Cure").

OBJECTION

I. Unpaid pre-petition and post-petition rents.

To cure defaults related to Debtor's pre-petition and post-petition failure to pay rents, Landlord asserts rents in the amount of **\$21,104.36**. Debtor failed to pay the January 2020 pre-petition rent payment in the amount of \$9,775.95 and the April 2020 post-petition rent payment in the amount of \$9,873.71 as each was due. Pursuant to the Rent Addendum to the Lease (the

"Rent Addendum"), an automatic late charge of 5% of the delinquent installment accrues when Debtor fails to pay a rent installment within 10 days of its due date. Pursuant to the Rent Addendum, such late fees are additional rent and not penalties. The late fees result in an additional \$488.80 for the missed January 2020 payment and an additional \$493.69 for the April 2020 payment. In addition to the late charges, the Rent Addendum provides that Debtor incurs interest at the maximum amount allowable by law on any default under the Lease. Pursuant to Miss. Code Ann. § 75-17-1, Landlord may charge interest at 8% per annum. Pursuant to the Lease, Landlord has calculated unpaid pre-petition and post-petition rents as of April 30, 2020 in the amount of \$21,104.36. An additional rent payment will become due on May 1, 2020 in the amount of \$9,873.71. If the May 2020 payment is not timely paid, additional fees and interest will accrue.

II. Unpaid property taxes under the Lease.

In addition to the unpaid rents set forth above, to provide a cure of the Lease, Debtor must also pay \$13,658.48 for property taxes paid by Landlord for the Premises. Such amount represents the assessed taxes for 2019 in the amount of \$13,390.66, plus an additional 2% penalty assessed for nonpayment by Lauderdale County, Mississippi. Pursuant to Section 7, paragraph (a) of the Lease, Debtor is responsible for paying all property taxes levied against the Premises.

Debtor failed to pay these property taxes by the due date of February 1, 2020. As a result, Landlord was forced to remit the payment on March 23, 2020. Such payment represents funds advanced by Landlord both to protect its interest in the Premises and to preserve the Premises for Debtor's use. These property taxes were due under the Lease, and accordingly, Landlord asserts that Debtor must pay this amount to cure and assume the Lease.

III. Attorney's fees and litigation costs.

Pursuant to Section 11, paragraph 16, subparagraph (f) of the Lease, Landlord is entitled to any and all attorney's fees, paralegal fees, and legal costs and expenses incurred by Landlord,

including on appeal and in this or any other bankruptcy proceeding. Landlord engaged Jones & Walden, LLC as its legal counsel in connection with the enforcement of the Lease in this bankruptcy proceeding. As of April 10, 2020, Landlord's attorney's fees total \$5,092.50. Landlord's counsel anticipates total attorney's fees, paralegal fees, and legal costs and expenses, including the \$5,092.50 as of April 10, 2020, in the amount of \$7,500.00. An itemization of the fees is available upon request.

IV. Objection / Reservation Re: Adequate Assurance of Future Performance.

The Sale Notice requires contract parties to specify any objection "to the ability of the Successful Bidder to provide adequate assurance of future performance with respect to any Assigned Contract . . ." [Sale Notice, pg. 2]. However, the Debtor has not yet identified a "Successful Bidder," and consequently they have not provided "*any*" information regarding adequate assurance of future performance as it pertains to any proposed assumption or assignment of the Lease. It is not the Landlord's obligation to "guess" about a potential buyer's ability to perform. Instead, the Debtor has the burden of proving adequate assurance of future performance.

Accordingly, it is premature to require objections at the present time on the issue of adequate assurance of future performance. As a protective measure, Landlord formally objects to the Sale Notice on grounds that the Debtor has failed to meet their burden of proving adequate assurance of future performance, and Landlord reserves the right to amend or supplement this response as required once a Successful Bidder is identified and such party actually provides the Landlord with financial information pertaining to its ability to perform under the Lease.

CONCLUSION

Landlord objects to any assignment or assumption of the Lease that does not provide for the Total Cure in full at the time of such assignment/assumption pursuant to 11 U.S.C. § 365(b)(1).

WHEREFORE, Landlord prays that this Objection be inquired into by the Court and sustained and that Landlord be granted such other and further relief as may be just and proper.

This 24th day of April, 2020.

JONES & WALDEN LLC

/s/ Leon S. Jones

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CERTIFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *Objection to Proposed Cure Amount* using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of and an accompanying link to this document to the following parties who have appeared in this case under the Bankruptcy Court's Electronic Case Filing Program:

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This 24th day of April, 2020.

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